presumed from the terms of the bill of lading and of the published schedules filed with the Commission." And in *M. K. & T. R. R.* v. *Harriman*[24] it was said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, "not only because referred to in the contract signed by them, but because they had been lawfully filed and published." In *C. R. I & P.* v. *Cremer*[25] the court said, "The provisions of the tariff enter into and form a part of the contract of shipment."

Hence we see that in the Abilene Oil Case a rate, when duly filed, is valid and binding and is notice to the shipper; in the Kirby Case we see that a contract, to be valid, must be set forth in the tariffs and duly filed; in the Croninger Case the knowledge of the shipper of the filed schedules is presumed; in the Harriman Case the shipper was compelled to take notice of the rate sheets in the tariff because they had been lawfully filed; in the Cramer Case we see that the provisions of the tariff form a part of the contract of shipment, and now finally in the Hooker Case the court has said that regulations incorporated in the tariff and properly filed are of as binding effect and as little open to adjudication by the courts as are the rates themselves.

C. McA. S.

LIBEL—CHARGE OF ILLEGITIMACY IN A WILL—LIABILITY OF EXECUTOR FOR PUBLICATION BY PROBATE—The Supreme Court of Tennessee has recently, in the case of *Harris* v. *Nashville Trust Company*,[1] adjudicated a case of first impression and, incidentally, has furnished one more instance in vindication of the staunch claim[2] of malleability and competency of common law jurisprudence and procedure to adjust itself to new forms of action as necessity shall require.

Plaintiff, a niece of the testator, had been involved in some litigation against the latter in regard to certain family estates under his administration. When the will was probated the following provision appeared, "And this sum of $250 to J. W., $1.00 to W. W., and $1.00 to Cleo W., *the illegitimate children of my brother James W.*, is all that they are ever to have of my estate." Cleo W. Harris, one of those designated in the above provision, brought an action for damages against the executor to recover damages on account of the libel against her contained in the testator's will *and published by*

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[24] 227 U. S. 657, 669 (1912). See also K. C. S. Ry. v. Carl, 227 U. S. 639 (1912), and Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469 (1912).

[25] 232 U. S. 490 (1913). See also Great Northern Ry. Co. v. O'Connor, 232 U. S. 508 (1913).

[1] 162 S. W. Rep. 584 (1914).

[2] Jacob v. State, 3 Humph. 493 (Tenn. 1842); Kujek v. Goldman, 150 N. Y. 176, 44 N. E. Rep. 773 (1896); Rice v. Coolidge, 121 Mass. 393 (1876).

probate of the will. The charge of illegitimacy was denied. The court declared that a tort had certainly been committed with regard to the rights of this plaintiff; that to traduce one's private reputation is a breach of the legal duty one owes to another, and is actionable; that it is libelous *per se* to charge one in print or writing with being illegitimate. "No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter on court records, as by probate of a will. The libel in this case . . . will be of widespread circulation. This testator was the owner of considerable real estate, and every time a transfer of the property is made and an examination of title necessitated, this will must be scrutinized, and the libel thus published will be called to the notice of parties interested. The stigma . . . will thus be made conspicuous for years to come." So far so good, the case of injury to the plaintiff has certainly been made out; the difficulty arises in fastening liability on the defendant, the executor as such.

In ruling that there was a liability on the executor as such the court referred to the liability of a principal who has given authority to publish a libel and the agent has made publication in substantial accord with his authority, concluding that "the publication of this libel was made by the agent, the executor, in literal pursuance of the authority given; that is to say, it was made by the probate of the testator's will." This reasoning can hardly be said to meet the issue presented. In the first place the principle of agency referred to was evolved from and is applicable to actions for libel against living defendant tort feasors. But if this theory of agency is advanced here as a controlling analogy, the court has *assumed* an essential point in the case for liability; for, with regard to agency in the broad sense, death of the principal terminates the authority, so the rule, on that ground, would seem to present an anomaly in the liability of a principal. Again, if the court is considering the office of executor to be a peculiar and special kind of agency, *i.e.*, an appointment by the testator in his lifetime of the one who shall be (executor and) agent for him and after his death for the purpose of preserving, marshalling and distributing his estate as he wishes, according to, and by grace of, the law—then, it would seem, that an exposition of the relationship, its liabilities and limitations, broader than the mere statement of its existence would be necessary, in view of the fact that such a principle can hardly be said to be prominent in the cases defining the authority of an executor. This is especially true with regard to the tort for libel, since it is peculiarly one of personal injury. There is another reason why the theory of agent can hardly be said to cover the question involved in the principal case; the case is novel—the scandalous words were written by the testator in his lifetime; the publication is by the executor after the testator's death. The cause of action was not complete in the testator's lifetime, since there was no publication; and the court's

view, that the maxim *actio personalis moritur cum persona* does not apply, is irrefutable. The second element necessary to the maintenance of action for libel, *viz.*, publication, is not present until after the testator's death when the executor acts by having the will probated. Thus the case stands astride the two great fields of action to which an executor is answerable in his official capacity, having an element traceable to each yet complete in neither, *viz.*, (1) actions upon liabilities or obligations accruing in the lifetime of the testator, as obligations arising from records, recognizances, statutory penalties, *quasi*-contracts, contracts express or implied, specialties,[3] *etc.*, and (2) actions against the executor with regard to title, torts with regard to the estate, actions in rem, contracts broken by provisions of the will, *etc.*[4] In the conclusion of the opinion the court makes one statement that would seem to show a truer ground of liability than that of agency as discussed in the body of the opinion. After referring to the liability of an executor in his official capacity for contracts breached by the provisions of the will, it is said, "If by will he (testator) commits a tort there seems to be no good reason why his executor and his estate should not likewise be held accountable." The position of the court is unquestionably wholesome and just. A new situation was presented, an injury done in a way that the law has seldom, so far as the cases show, been called upon to redress.[4a] To rule that redress might be had from the estate of the perpetrator, and recompense be given to the injured, without doing violence to any of the established rules of law, will have an effective and salutary influence on intending indulgers in this not infrequent despicable method of injuring innocent persons through scandalous statements made in wills.

At first glance the case seems to stand in direct opposition to the maxim relating to non-survival of causes of action for tort upon which the defense rested. In discussing this the court, after showing that had no application to the case, reviewed in an interesting way the development, scope and limitations of the doctrine, referring to it as obscure in origin and resting upon adjudication in fact, "barbarous." "It has no champion at this date, nor has any judge or law writer risen to defend it for two hundred years." The court also discusses, as additional ground for its desire to afford relief in this field of cases, the practical limitations placed on the doctrine by Lord Mansfield's decision in 1776 in the case of *Hambly* v. *Trott*,[5] where the remedy of assumpsit in *quasi*-contract was laid down to be concurrent with certain tort actions, and to survive against the executor. And as a final protest against the force of the maxim,

[3] Williams on Executors, 10th Ed., Bk. 2, Ch. 1, p. 1346, *et seq.*

[4] *Ibid.*, 1353, *et seq.*

[4a] The point has been discussed in the Orphans' Court of Allegheny County, Pa. Gallagher's Estate, 10 Pa. D. R. 733 (1901).

[5] 1 Cowp. 373, 98 English Reprint, 1136.

the court pointed to the well-nigh universal passage of statutes providing for the survival of certain tort actions begun by or against the decedent,[6] and to those providing for original institution by his representatives.[7]

It may be interesting to test the result of this decision by the principles of the Roman law; that is the principle of "universal succession." The person or persons who succeeded did not simply *represent* the deceased, but they continued his civil life, his legal existence. With the Romans it seemed a simple and natural process to eliminate the fact of death from the devolution of rights and obligations.[8] The testator lived on in his heir; he was in law the same person with them. The rights and *obligations* which attached to the deceased head of the house would attach, without breach of continuity, to his successor.[9] In Roman law the term "obligation" included both *contract,* in all its form, and *delict* or wrong. Both descended to the successor and remained assets or liabilities, as the case might be.[10] Thus it will be seen that any jurisdiction influenced by the principles of the Roman law would rule the principal case to the same conclusion as did the Supreme Court of Tennessee.

Another point of interest in the case was the *dictum* of the court that there could be no *personal* liability fastened on the executor upon the facts as presented; that he was under legal duty to probate the will; that he would be criminally responsible for suppression of it. But, *quaere,* in view of the jurisdiction of the courts of equity and of probate to strike out scandalous matters from pleadings and records and wills, would the executor have any defense to the action? The jurisdiction mentioned was well defined in the English Ecclesiastical Courts,[11] was recognized in Court of Probate in England;[12] and though no adjudicated case can be found in the American reports, it probably exists. There is no reason to be advanced against the exercise of it by our courts of equity and of probate. And if such proceedings may be had to remove scurrilous and scandalous parts from wills, there remains no justification for an executor to plead compulsion of law to libel an innocent party.

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[6] *E. g.,* in Pennsylvania, Act April 15, 1851, §18, P. L. 669, providing for survival of certain actions in tort where plaintiff dies; and Act June 24, 1895, P. L. 236, providing for survival of certain action in tort where the defendant dies during suit.

[7] *E. g.,* in Pennsylvania, Act April 15, 1851, §19, P. L. 669, and as amended Act April 26, 1855, P. L. 309.

[8] Maine, "Ancient Law," 182, 183.

[9] *Ibid.,* 179.

[10] *Ibid.,* 313, 314; Hunter "Roman Law," 126, *et seq.*

[11] Curtis v. Curtis, 3 Addams, 33 (Eng. 1825); *In re* Wartnaby, 1 Rob. Ecc. 423 (Eng. 1846).

[12] Marsh v. Marsh, 1 Sw. & Tr. 528 (Eng. 1860); *In re* Honywood, L. R. 2 Prob. & Div. 251 (Eng. 1871).

True, the words were written by another; the probate is compulsory; but probate of a harmless, not an injurious instrument. And, above all, in cases like this, where the injurious and offensive matter may be removed without violence to or effect upon the determination and validity of the bequest.

J. C. A.

PATENTS—RIGHTS UNDER CONFLICTING DECISIONS—As the Circuit Courts are not bound by each other's decrees, a prior adjudication of a patent will not determine its status in another circuit,[1] and it not infrequently happens that the same patent is held invalid, or not infringed by a certain device in one circuit and valid and infringed by an identically similar device in another circuit. Until the decision of *Kessler* v. *Eldred*,[2] it was generally believed (though there were no adjudicated cases on the point) that the validity or invalidity of a patent was limited by the geographical boundaries of the circuit where the decree was rendered, and that an article, made under a decree declaring a patent invalid, could not be sold in another circuit where the patent had been held valid. This at least afforded a workable rule.

In that case, however, Eldred, the owner of the Chambers patent for electric cigar lighters, sued Kessler in the Northern District of Indiana, where it was held that Kessler's lighter did not infringe. Subsequently a similar lighter made by Kirkland in the Second Circuit was held to infringe. Eldred then sued Breitweiser, who was using Kessler's lights in the Second Circuit. But Kessler obtained a decree enjoining Eldred from prosecuting anyone for infringement of the Chambers patent by purchase, use or sale of the lighters made by Kessler. The United States Supreme Court held on *certiorari* that Kessler had the right to manufacture and sell his lighters throughout the United States and that a suit against any customer of his was a wrongful interference with his business.[3]

The decision is strictly limited to the rights of the successful infringer, the court expressly refusing to determine whether his

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[1] Mast v. Stover, 177 U. S. 485 (1900); Welsbach v. Cosmopolitan, 104 Fed. Rep. 83 (1900); Imperial v. Crown, 139 Fed. Rep. 312 (1905); 18 HARV. L. REV. 217.

[2] 206 U. S. 285 (1906).

[3] This doctrine includes interference with customers in a foreign country; Goodyear Tire Co. v. Rubber Tire Co., 164 Fed. Rep. 869 (1908), and allows an injunction to prevent an interference *pendente lite;* Commercial Co. v. Avery Lighting Co., 159 Fed. Rep. 935 (1908), but does not include the sale of any infringing article made in this district where the patent was held invalid; Consolidated Co. v. Diamond Rubber Co., 157 Fed. Rep. 677 (1907).